IN THE HIGH COURT OF JUDICATURE AT BOMBAY

T & I J.

MISC.PETITION NO.9 OF 2002

AND

PETITION NO.113 OF 2000

...

Shri Deepak B. Saraf ...Petitioner

v/s.

Shri Arun B. Saraf ...Respondent

...

Mr.Gaurav Joshi with Mr.Girish Desai i/b O.B.Molankar for the Petitioner.

Mr.Shailesh Shah i/b K.A.Sampat for the Respondent.

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CORAM: D.K.DESHMUKH, J.

DATED: 14TH JUNE, 2007

P.C.:

1. This petition has been taken out for revoking the probate of the Will granted by this court in Probate Petition No.1113 of 2000.

2. Admitted facts are that the present Respondent Arun B. Saraf filed a petition in this court for probate of the Will of his father Mr.Banwari H. Saraf who expired on 29-4-1999. The present Petitioner Deepak B. Saraf admittedly is the son of the deceased and brother of the original Petitioner Arun.

3. Admittedly the present Petitioner Deepak was cited in the probate petition as one of the heirs of the deceased.

4. Admittedly only one mode of service of citation on Petitioner Deepak was adopted namely by serving the citation by Registered Post A.D. Admittedly, affidavit proving the service was filed by one Deepak Mirke, who described himself as a clerk in the office

of M/s.Pramodkumar & Co., Advocates. He stated in paragraph 1 of the affidavit that pursuant to the instructions given to him by the advocate he made an application to the Prothonotary & Sr.Master to transmit the packet containing Citation and copy of the Petition to serve it upon the Petitioner Mr.Deepak Saraf by R.P.A.D. He further states that the packet containing citation and petition was sent by R.P.A.D. to the Petitioner-Deepak through the Testamentary Department of the High Court. He further states that the packet was served on Deepak Saraf. He made that statement on the basis of acknowledgement card which is signed by one R.Saraf. He states that the acknowledgement card is signed by the wife of Mr.Deepak Saraf namely Mrs.Ranjana Saraf, and therefore, according to him service is properly effected. Admittedly, this service was accepted as good service by the office of this court and as Deepak did not file a caveat within the time allowed by the Rules, probate was granted.

5. According to the Petitioner-Deepak, the mode of service adopted by the original Petitioner for service of citation is totally unauthorised. The Rules do not permit service of citation by post.

Only one method of service is acknowledged i.e. primarily personal service and where the personal service is not possible, the service by advertisement. Therefore, in this case, there is not even an attempt made to effect the service in accordance with rules. It is further submitted that the said Deepak Mirke has made incorrect statement in his affidavit. He has stated that the acknowledgement was signed by the wife of the Petitioner-Deepak. But he no where states that he is familiar with the signature of the wife of the Petitioner-Deepak Saraf.

6. On behalf of the original Petitioner Arun, it is submitted that it is true that no attempt to effect personal service as required by the Rules was made. But according to the original Petitioner Arun, the packet was delivered by Postman at the residence of Deepak, where original Petitioner Arun was also residing. He states that that packet was handed over by the wife of Deepak to him. He carried that packet to the office of Deepak and delivered it to Deepak and Deepak signed the acknowledgement. Thus, according to the original Petitioner, the citation was personally served on Deepak Saraf, the present

Petitioner. The original Petitioner Arun also relies on a statement made in paragraph 24 of the affidavit dated 21-1-2002 of Deepak, where Deepak has stated that he could not have filed a caveat in relation to Will of his father because he knew that his father has excluded him from the Will. It is submitted that the statement shows that he was served with the citation and he did not want to file a caveat.

7. The Petitioner Deepak has filed an affidavit explaining his statement in the affidavit dated 21-1-2002, relied on by the original Petitioner. He states that after probate was granted in favour of the Petitioner Arun, while he was away from the City, he was removed from the joint family house and he filed the affidavit dated 21-1-2002 in those circumstances. It is claimed that in the same affidavit a clear statement has been made on behalf of Deepak that he was never served with the Citation and that he did not sign any acknowledgment as claimed by the original Petitioner-Arun.

8. Now, if in the light of these rival submissions the record of the case is perused, it becomes clear that for serving citation on Deepak there was only

one method of service adopted, namely service by sending the packet by post. There is a specific Rule framed in the Original Side Rules for service of citation. That Rule is Rule 399. That Rule reads as under:-

> 399. Citations shall be served personally when possible. Personal service shall be affected by leaving a true copy of the citation with the party cited and taking his acknowledgement on the original.

9. Perusal of the above Rule shows that primary mode of service is personal service and that the service is to be effected by leaving a true copy of the citation with the party cited and taking his acknowledgement on the original. Then comes Rule 400. It reads as under:-

> 400. Citations which cannot be personally served as required by the last preceding rule shall be served by publishing the same in such local newspapers as the Prothonotary & Senior Master may direct.

10. Perusal of the above Rule shows that the second method of citation provided by the Rules is by publishing the notice in newspaper. Thus, there are only two methods of service recognised by the Rules in so far as the service of citation is concerned. If one reads Rules 399 and 400 with Rule 76 of the same Rules, the intention of the Rule making authority becomes more clear. Rule 76 reads as under:-

> 76. A writ of summons shall be served within the local limits of the Ordinary Original Civil Jurisdiction of the High Court by personal service or, if the plaintiff so desires, by registered post pre-paid for acknowledgement. Where the Writ of Summons is to be served at a place situate beyond the said limits, it may be served by registered post pre-paid for acknowledgment. An acknowledgement purporting to be signed by the defendant or an endorsement by a postal servant that the defendant refused service shall be deemed to be prima facie proof of service. In all other cases, the Court shall

hold such inquiry as it thinks fit and either declare the summons to have been duly served or order such further service as may in its opinion be necessary.

11. Perusal of the above Rule shows that in so far as the service of Writ of Summons is concerned, there are two modes of service recognised, one personal service and at the application of the Plaintiff service by Registered Post A.D. It is nobody's case that the Petitioner Deepak was not within the local limits of the original jurisdiction of this Court and therefore, the only mode of service available for effecting service on him was personal service and admittedly, that mode of service has not even been attempted in the present case. The method by which the personal service can be effected is to be found in the Rules framed under Chapter XXVIII of the same Rules. Which lays down that the process of the High Court is to be served and executed by the Sheriff. Thus, the personal service as contemplated by Rule 399 will have to be effected through the office of the Sheriff of Bombay. In the present case, not even an attempt has been made to follow that course of action. I am really amazed, as to how the office of

the High Court accepted the application made by the original Petitioner Arun for effecting service through post. The order made by the Prothonotary & Sr.Master which is referred to in the affidavit of the clerk permitting service of citation by post, in my opinion, itself was infirm and was not sanctioned by Rules and therefore all steps taken pursuant thereto have to be ignored.

12. As I have observed above, that the only primary mode of service recognised by the Rules is personal service and that personal service has to be effected through the Sheriff, really speaking service alleged to have been effected by the original Petitioner on Deepak and acknowledgement allegedly secured from him is really not relevant. However, even if one considers that aspect, the circumstances narrated in the affidavit of Arun Saraf do not appear to be natural. The requirement of the Rules is that the acknowledgement has to be obtained on the original. In the present case, there is a separate acknowledgement and that acknowledgement also does not inspire confidence. Deepak is supposed to have signed the acknowledgement describing himself as Proprietor of Saraf Industries. In any case, in my

opinion, as in the present case, even an attempt has not been made to effect personal service as sanctioned by the Rules, these aspects are not significant. According to Arun-the original Petitioner, from the documents produced on record it appears that Deepak was aware of the pendency of the probate petition, though no citation might have been served on him as required by the Rule and he has stated that he could not have filed a caveat because he knew that he has been excluded from the Will by his father and therefore, no useful purpose will be served by setting aside the probate. In my opinion, the submission does not have substance. Whether Deepak ultimately files a caveat or no, is not relevant at this stage. What is relevant is, Was the Citation served on Deepak by adopting the method sanctioned by the law? He was entitled to be served with the petition by the method provided by the law and he has not been so served.

. Perusal of Rule 401 of the Rules shows that caveat can be filed by the person on whom citation has been served within fourteen days of the service of the citation. Thus for the period of limitation to begin, the citation will have to be served by

following the method sanctioned by the Rules. The question, whether the petitioner would have filed the caveat had he been served with the citation in accordance with law cannot, in my opinion, be answered in the negative at this stage relying on the statement made by the Petitioner in an affidavit filed by him after the probate of the Will was granted and on the basis of that probate, as alleged by him, he was thrown out of the family house. That question may be raised by the original petitioner, when the petitioner files a caveat and the original Petitioner applies for removal of that caveat. No doubt Rules 399 and 400 of the Rules are procedural Rules, therefore, are directory in nature. The settled law is that the Rules which are directory are to be followed, but because of its directory nature exact compliance of the Rules cannot be insisted upon, substantial compliance of the Rules is enough. But, nevertheless, an attempt has to be made to comply with the Rules. The Rules which are directory cannot be ignored altogether. In the present case the Rules have been totally ignored and the procedure which is not sanctioned by the Rules has been adopted. If the court does not set aside the probate in this case granted in total violation of the Rule,

it may be taken as sanction by the court to the course of action adopted by the office, which as observed above, totally ignores the Rules framed by the Court. The Rules are framed by the Court in exercise of its Rule making power. Most of the Rules are procedural, but merely because the Rules are procedural does not give licence to the office of the court and the litigants to ignore them totally, not make even an attempt to follow them and adopt a procedure which is not sanctioned by the Rules. In these circumstances, taking overall view of the matter, in my opinion, the probate granted in Probate No.1113 of 2000 has to be revoked.

. One aspect of the matter, in my opinion, that deserves to be noted is that the consequence of setting aside the probate is that now citation will have to be served on Deepak, so that he will get an opportunity to consider whether he wants to file a caveat or not. In other words the consequence of this order is that the Petitioner will get an opportunity to consider whether he wants to file a caveat. In case he choose to file a caveat, the original petitioner will be at liberty to seek the removal of that caveat on such ground, as may be

available to him including the ground based on the affidavit alleged to have been filed by the Petitioner before the City Civil Court.

13. In the result, therefore, petition succeeds and is allowed. Petition is granted in terms of prayer clauses (a) & (b). No order as to costs.

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